BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLENN STEINERT	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,915
KANSAS GAS SERVICE	)	
Respondent,	)	
Self-Insured	)	

ORDER

Respondent appealed the March 28, 2000 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

This is a claim for a series of repetitive injuries to the right shoulder from October 8, 1998, to January 26, 1999. After conducting a hearing on March 21, 2000, the Judge ordered respondent to provide claimant with the names of three physicians from which claimant could select a treating physician.

Respondent contends Judge Clark erred. Respondent argues that claimant did not prove that (1) his shoulder injury arose out of and in the course of employment and (2) he provided timely notice of the accidental injury.

Conversely, claimant contends the record clearly establishes that (1) he tore his right rotator cuff while working for respondent as the result of a series of accidents and (2) he provided respondent with timely notice of the accidental injury as he reported it within days after discovering he had injured his shoulder.

The only issues before the Appeals Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment?

2. If so, did claimant provide respondent with timely notice of the accidental injury?

FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds:

1. Claimant alleges that he sustained a series of mini-traumas or accidents while working for respondent from October 8, 1998, to January 26, 1999. Respondent is a gas company and, during the period of alleged accident, claimant worked as a service person who was assigned to locate gas leaks and repair meters. The job required claimant to perform strenuous physical labor.

2. Claimant began noticing a gradual onset of intermittent right shoulder pain in either late October or early November 1998. Despite those symptoms, claimant continued to work as he believed he was merely experiencing arthritis.

3. Claimant worked through January 6, 1999. It appears that Dr. Michael Estivo took claimant off work on January 8, 1999, pending surgery, after diagnosing a tear in the right rotator cuff. In a medical note dictated January 18, 1999, Dr. Richard Piazza diagnosed an overuse syndrome in the right shoulder along with a partial tear of the right rotator cuff. On January 26, 1999, Dr. Estivo operated on claimant's shoulder.

4. The Appeals Board finds that it is more probably true than not that claimant injured his right shoulder while working for respondent in a series of accidents that ended January 6, 1999.

5. On January 8, 1999, immediately after learning that his shoulder problem was not arthritis and that it was probably caused by the work that he did for respondent, claimant reported the accidental injury to his supervisor who then prepared an injury report.

CONCLUSIONS OF LAW

1. The preliminary hearing Order should be affirmed.

2. Because of the strenuous nature of claimant's work for respondent and the insidious nature in which his shoulder symptoms developed, the Appeals Board finds that claimant sustained a series of accidents involving the right shoulder that progressed and continued through January 6, 1999.

3. According to the principles set forth in *Treaster*,[1] the appropriate date of accident for this series of repetitive mini-traumas is January 6, 1999.

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[1] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

In *Treaster*, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. But *Treaster* can also be interpreted as focusing upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[2]
>
> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[3]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*,[4] in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

In the case before us, when claimant left work for surgery he stopped performing the offending work activity that had caused his torn rotator cuff. Therefore, that date should be used as the date of accident for purposes of this claim.

4. Claimant notified the respondent of the accidental injury on January 8, 1999, which was within ten days of the January 6, 1999 date of accident. Therefore, notice was timely.[5]

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[2] *Treaster*, syl. 3.

[3] *Treaster,* syl. 4.

[4] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[5] See K.S.A. 44-520.

WHEREFORE, the Appeals Board affirms the March 28, 2000 preliminary hearing Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

c: James E. Martin, Overland Park, KS
Larry G. Karns, Topeka, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director